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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 1022

GENE FINK, JEROME FINKELSTEIN, CHARLOTTE FINK, MAX BLUMENFELD and GENE FINK, as co-partners, LLOYD M. BLUMENTHAL, JACK and ESTHER BLUMENTHAL, PHILLIP GOODMAN, and MARTIN GOODMAN,

Petitioners,

vs.

CONTINENTAL FOUNDRY & MACHINE COMPANY, a Delaware corporation, JAY T. OSLER, J. H. BRIGGS, KENT B. HALL, GRIER PATTERSON, J. H. ROSE, EARL STEWARD, and WILLIAM E. TROUTMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

No.

GENE FINK, JEROME FINKELSTEIN, CHARLOTTE FINK, MAX BLUMENFELD and GENE FINK, as co-partners, LLOYD M. BLUMENTHAL, JACK and ESTHER BLUMENTHAL, PHILLIP GOODMAN, and MARTIN GOODMAN,

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CONTINENTAL FOUNDRY & MACHINE COMPANY, a Delaware corporation, JAY T. OSLER, J. H. BRIGGS, KENT B. HALL, GRIER PATTERSON, J. H. ROSE, EARL STEWARD, and WILLIAM E. TROUTMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Gene Fink, Jerome Finkelstein, Charlotte Fink, Max Blumenfeld and Gene Fink, as co-partners, Lloyd M. Blumenthal, Jack Blumenthal, Esther Blumenthal, Phillip Goodman, and Martin Goodman respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 3, 1957.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 240 F. (2d) 369 and is set forth in full in the Appendix to this petition, *infra*, pp. 14a-25a. That opinion affirmed on the single ground of mootness a judgment entered by the United States District Court for the Northern District of Indiana, Hammond Division. The District Judge did not render a formal opinion, but he did file Findings of Fact and Conclusions of Law. (R. 322-326)

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit affirming on the ground of mootness the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on January 3, 1957, *infra*, pp. 14a-25a. A petition for rehearing was denied on February 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1). Certiorari is prayed on the ground that the decision below conflicts with that of another Court of Appeals, with applicable decisions of this Court, and with a prior decision of another division of the Court below.

QUESTION PRESENTED.

Whether in a minority stockholders' suit to restrain the sale of all of a corporation's assets and for incidental relief, the cause becomes moot because, during the pendency of an appeal from the trial court's judgment for the defendants, the sale is consummated.

STATEMENT OF THE CASE.

This suit was a secondary action by shareholders to restrain the respondent, Continental Foundry & Machine Company, its officers, directors, employees, servants, and agents, from consummating a plan for its liquidation by the sale of all its assets and for other relief. Jurisdiction was based on diversity of citizenship under 28 U.S.C.A. 1332.

At the trial below, the petitioners adduced copious evidence, both oral and written, establishing that:

1. The directors of Continental Foundry & Machine Company in consenting to the terms and conditions of the sale sought to be enjoined acted with reckless indifference to, and in deliberate disregard of, the interests of that company's stockholders.

2. The proxy statement in which the officers and directors of Continental Foundry & Machine Company recommended the said sale to the stockholders contained several materially false and misleading statements.

On November 14, 1955, the trial judge filed written Findings of Fact and Conclusions of Law denying the petitioners' prayer for a permanent injunction and dismissing the action at petitioners' cost. Some two weeks later, the petitioners filed a petition in the Court of Appeals for the Seventh Circuit requesting a temporary order restraining the respondents from consummating the said sale pending the outcome of the appeal. (*infra*, pp. 5a-13a) This petition was denied on December 6, 1955.

Thereafter, during the pendency of the appeal, the respondents proceeded to consummate the sale sought to be enjoined. Although the petitioners prayed incidental

relief against the directors of Continental Foundry & Machine Company, the Court of Appeals, in its opinion filed after the sale had been fully completed, held that no relief could be granted because the matter had become moot.

REASONS FOR ALLOWANCE OF WRIT.

A review on Writ of Certiorari is prayed on the grounds that the Court of Appeals has:

A. Rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

B. Decided a question of general federal law in a way in conflict with applicable decisions of this Court; and

C. Has decided a question of general federal law in a manned conflicting with a decision of another division of the same Court of Appeals, rendered only a few months previously.

A. The Court of Appeals below has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

The Court of Appeals below relied primarily on the holding in *Sobol* v. *Whittier Corporation,* 195 F. (2d) 360 (C.A. 6). That case is distinguishable on the facts, but, assuming, *arguendo,* that is not, it is obviously inconsistent and in conflict with the holding of the Circuit Court of Appeals for the Third Circuit in *Barrett* v. *Denver Tramway Corporation,* 146 F. (2d) 701, which in turn followed *United States* v. *Bates Valve Company,* 39 F. (2d) 162 (D.C. Del. 1930). This last decision rested in large part upon the holding of this Court in *Clark* v. *Wooster,* 119 U.S. 322, 7 S. Ct. 217, 30 L. Ed. 392 (1886). The facts in the *Barrett* case were, if anything, less

favorable to the petitioners' position than the facts in the instant cause. The District Court had entered an order of dismissal in a suit to enjoin the consummation of a proposed recapitalization plan. The plaintiffs applied for a stay order in the Circuit Court of Appeals, and it was granted upon the condition that they file a surety bond in the sum of $20,000.00. The plaintiffs having failed to comply with this requirement, the defendant proceeded to consummate the plan under attack before the adjudication of the appeal. In disposing of the issue of mootness the Circuit Court of Appeals said:

> "Nor do we see that the controversy has been rendered moot by the fact that the defendant has followed through on its reclassification program . . . The illegality of the plan, because of its alleged unfairness, is vigorously urged in this court as it had been below. In *United States* v. *Bates Valve Corporation,* D.C. Del., 39 F. (2d) 162, at page 164, the court said: '* * * in a suit in which the pleadings disclose a proper case for injunctive relief when the suit was instituted and a prayer for an injunction and incidental relief, the removal during the pendency of the suit of the grounds for injunctive relief does not take away the jurisdiction or bar the court from granting the incidental relief, if upon final hearing the allegations are sustained by proof.' "

B. The Court of Appeals has decided a question of general federal law in a way in conflict with applicable decisions of this Court.

This Court has repeatedly held that the destruction of the subject matter during the pendency of an appeal does not render a cause moot. In *Porter* v. *Lee,* 328 U.S. 246, 65 S. Ct. 1095, 9 L. Ed. 1199 (1945), this Court said:

"We also think the Circuit Court of Appeals erred in holding that the case was moot. The mere fact that the Beevers in order to comply with the writ of possession vacated the apartment was not sufficient to end the controversy. It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo."

To the same effect are *Texas & New Orleans Railroad Company* v. *North Side Belt Railway Company*, 276 U.S. 475, 72 L. Ed. 661 (1927), and *Jones* v. *Security and Exchange Commission*, 298 U.S. 1, 56 S. Ct. 634, 80 L. Ed. 1015 (1936). The decision of the Court of Appeals below is completely at variance with these decisions by this Court. The respondents have been engaged in a course of conduct described by the Supreme Court of Pennsylvania in a decision relied on in the *Jones* case as a "race against the law." To permit them now to avail themselves of the defense of mootness is to place a premium upon wrongful acts provided that they are speedily concluded before an appellate tribunal can pass upon the merits.

C. The Court of Appeals has decided a question of general federal law in a manner conflicting with a decision of another division of the same Court rendered only a few months previously.

A few short months before the opinions sought to be reviewed, another division of the Court below held in *Ramsberg* v. *American Investment Company*, 231 F. (2d) 333 (1956):

"And even where the subject matter has been so completely destroyed as to preclude restoration of the status quo, the court has jurisdiction to grant incidental relief and the cause is not moot."

The authorities cited in support of this proposition were *Barrett* v. *Denver Tramway Corporation*, 146 F. (2d) 701, and *United States* v. *Bates Valve Bag Co.*, 39 F. (2d) 162, referred to above. In other words, in the *Ramsberg* case, one division of the Court of Appeals followed a line of authority adopted by the Third Circuit, and in the instant cause another division has followed a line of authority represented by the opinion of the Court of Appeals for the Sixth Circuit in *Sobel* v. *Whittier Corporation*, 195 F. (2d) 360. It is respectfully urged that, regardless of a conflict of decision with another Court of Appeals, one division of a Court of Appeals ought not to follow one line of authority while another pursues a diametrically opposed line, particularly within a period of a few short months.

CONCLUSION.

The transaction attacked by the petitioner involved assets aggregating many millions of dollars and affected some 2700 stockholders of record. The evidence introduced by the petitioner was voluminous and in the main uncontradicted. Although it clearly raised several important questions of corporate ethics, nowhere in the opinion below is any mention made of any of them. Although the petitioners have contended, and, it is respectively submitted, have proved, that the directors of Continental Foundry & Machine Company have been guilty of a deliberate disregard of the rights of the stockholders of that corporation, not one word is said with reference thereto by the Court of Appeals. The merits of the case have been ignored by invoking the doctrine of mootness and by invoking it in a manner clearly in

conflict with the recorded decisions of this Court, of another Court of Appeals, and of another division of the Court of Appeals below.

In the interest of justice the stockholders of Continental Foundry & Machine Company are entitled to know whether the acts of their directors were proper, legal, and fair. If they were, no harm can be inflicted upon any one by a judicial review and analysis of the wrongs charged.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GENE FINK, JEROME FINKELSTEIN, CHARLOTTE FINK, MAX BLUMENFELD and GENE FINK, as co-partners, LLOYD M. BLUMENTHAL, JACK and ESTHER BLUMENTHAL, PHILLIP GOODMAN, and MARTIN GOODMAN,
Plaintiffs-Appellants,

v.

CONTINENTAL FOUNDRY & MACHINE COMPANY, a Delaware corporation, JAY T. OSLER, J. H. BRIGGS, KENT B. HALL, GRIER PATTERSON, J. H. ROSE, EARL STEWARD, and WILLIAM E. TROUTMAN,
Defendants-Appellees.

No.

MOTION TO DISMISS THE PETITION FOR AN INJUNCTION AND THE APPEAL

Now come Continental Foundry & Machine Company, a Delaware corporation, J. T. Osler, J. H. Briggs, Kent B. Hall, Grier Patterson, and Earl Steward, by Harold A. Smith, Grier D. Patterson and Edward J. Wendrow, their attorneys, and move the Court to enter orders: (1) Dismissing the petition for an injunction pending the appeal; and (2) Dismissing the appeal.

As grounds for said motions, movants show unto the Court that said petition for an injunction and the appeal have become moot, and in support thereof tender herewith the affidavit of Grier D. Patterson.

/s/ Harold A. Smith
/s/ Grier D. Patterson
/s/ Edward J. Wendrow
Attorneys for Appellees

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State of Illinois }
County of Cook } ss.

Grier D. Patterson, being first duly sworn, on oath deposes and says:

1. The above action was filed in the United States District Court for the Northern District of Indiana, Hammond Division, by certain stockholders of Continental Foundry & Machine Company (hereinafter referred to as "Continental"), seeking to enjoin its liquidation and the sale of certain of its assets to Blaw-Knox Company. On September 19, 1955, at a meeting of the Board of Directors of Continental resolutions were adopted approving a Plan of Complete Liquidation of Continental, which, among other things, contemplated that its plant properties, inventories, and certain other assets were to be sold to Blaw-Knox Company, a Delaware corporation, for approximately $19,700,000 in cash and the assumption by Blaw-Knox Company of certain liabilities of Continental, subject to the approval of the stockholders at a meeting set for October 31, 1955; that on the same date an Asset Purchase Agreement, in accordance with the resolutions, was entered into between Continental and Blaw-Knox Company, a copy of which is attached to the petition filed in this court for an injunction; that said stockholders' meeting thereafter was duly held and said Plan of Liquidation and said sale to Blaw-Knox Company approved; that in their injunction action in the District Court filed on October 28, 1955, plaintiffs charged that the purchase price for the assets agreed to be sold by Continental to Blaw-Knox Company was not adequate; that trial on plaintiffs' claim for a permanent injunction was had on the issues raised by plaintiffs' complaint and defendants' answers, commencing November 4, 1955, and was completed on November 8, 1955; that at 9:00 A.M. (C.S.T.) on November 14, 1955, the Court entered its findings of fact, conclusions of law, and a judgment in favor of defendants, a copy of which is attached to the petition for injunction in this Court as Exhibit 2; that in its findings the Court below found, inter alia, that "The plaintiffs

have failed to prove that the proposed sale of Continental's assets at substantially their book value is an inadequate or unfair sale price or that the directors acted negligently or with reckless disregard for the rights of the stockholders in approving the plan of liquidation which included the sale, and recommending it to the stockholders as being expedient and for the best interest of the company."

2. Said Agreement between Continental and Blaw-Knox Company provided that the closing date should not be later than November 14, 1955, and that it should be at the hour of 10:00 A.M. (E.S.T.) in the Farmers Bank Building, Pittsburgh, Pennsylvania; that when the District Court took the case under advisement it advised counsel that it would make its decision on or before the morning of November 14, 1955, in order that, in the event it held against the plaintiffs, it would do so prior to the time and date fixed for closing; that counsel for defendants advised the District Court and counsel for plaintiffs that, in the event the Court did hold against the plaintiffs, the sale would be consummated in accordance with the terms of said Agreement between Continental and Blaw-Knox Company.

3. On November 14, 1955, at the hour of 10:00 A.M. (C.S.T.), affiant was in Pittsburgh, Pennsylvania, at which time he received notice that the Court below had dismissed plaintiffs' action; that thereupon there was delivered by Continental to Blaw-Knox Company deeds to the real property agreed to be sold and bills of sale for the personal property; that, in exchange, Blaw-Knox Company paid over the agreed purchase price, subject to adjustments, consisting of checks and government bonds, and took possession of the assets sold to it by Continental; that on said date said Asset Purchase Agreement was consummated in accordance with its terms.

4. On November 17, 1955, the Board of Directors of Continental passed resolutions ordering an initial liquidating distribution of $40 per share to stockholders of record

at the close of business on November 29, 1955, to be mailed to stockholders on December 9, 1955. Under a letter dated November 17, 1955, a true and correct copy of which is hereto attached as Exhibit 1, the stockholders of Continental, including the plaintiffs herein, were advised of the foregoing fact and were also advised that the company was proceeding to liquidate its remaining assets and that the company would make further liquidating distributions as soon as feasible.

5. The petition for an injunction pending the appeal herein contains allegations which give the impression that the sale to Blaw-Knox Company has not yet been consummated; in truth and in fact, the sale was consummated on November 14, 1955, as hereinabove set forth, pursuant to said Agreement between Continental and Blaw-Knox Company.

Further affiant saith not.
Subscribed and sworn to before me,
this ..... day of December, 1955.
Notary Public

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GENE FINK, JEROME FINKELSTEIN, CHARLOTTE FINK, MAX BLUMENFELD and GENE FINK, as co-partners, LLOYD M. BLUMENTHAL, JACK and ESTHER BLUMENTHAL, PHILLIP GOODMAN, and MARTIN GOODMAN,
Plaintiffs-Appellants,

v.

CONTINENTAL FOUNDRY & MACHINE COMPANY, a Delaware corporation, JAY T. OSLER, J. H. BRIGGS, KENT B. HALL, GRIER PATTERSON, J. H. ROSE, EARL STEWARD, and WILLIAM E. TROUTMAN,
Defendants-Appellees.

No.

PETITION

The petition of Gene Fink, Jerome Finkelstein, Charlotte Fink, Max Blumenfeld and Gene Fink, as co-partners, Lloyd M. Blumenthal, Jack and Esther Blumenthal, Philip Goodman, and Martin Goodman, respectfully represents:

1. That they are the plaintiffs-appellants in the instance cause; that on November 25, 1955, they filed with the United States District Court for the Northern District of Indiana, Hammond Division, a Notice of Appeal from a judgment entered by that court on November 14, 1955, and from an order entered by that court on November 22, 1955; that this is a petition for an injunction during the pendency of the appeal for the reasons and on the grounds hereinafter set forth.

2. That this suit is a secondary action brought by the plaintiff-appellants under Rule 23 (b) of the Rules of Civil Procedure as stockholders of the defendant-appellee, Continental Foundry & Machine Company, a Delaware corporation (hereinafter referred to as "Continental"), and is brought by the plaintiffs-appellants on behalf of

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themselves and any other stockholders of Continental who may come in and contribute to the expenses of this suit, except such as are named defendants herein; that jurisdiction herein is based on diversity of citizenship; that the amount in controversy is in excess of $3,000, exclusive of interest and costs.

3. That on September 19, 1955, a special meeting of the Board of Directors of Continental was called and held for the purpose of considering a plan for the liquidation of Continental; that the said plan contemplated that all of the plants, properties, inventories, and certain other assets of Continental were to be sold to Blaw-Knox Company, a Delaware corporation, for a consideration consisting of approximately $19,700,000.00 in cash and the assumption by the said Blaw-Knox Company of certain specified liabilities of Continental; that the said plan of liquidation, if carried into effect, will yield the stockholders of Continental approximately $52.00 per share; that of the said $19,700,000.00, $12,300,000.00 was to be paid for the plants and equipment of Continental and the balance was to be paid for the inventory of Continental.

4. That the said plan was considered by the Board of Directors of Continental for the first time at the said meeting of September 19, 1955; that resolutions were then and there adopted approving the said plan and directing that it be submitted to the stockholders of Continental for their approval or rejection at a special meeting to be held on October 31, 1955; that notice of the said special meeting was received by the plaintiffs-appellants and the other stockholders of Continental on or about October 5, 1955; that on this last date each stockholder of Continental received in the mail a notice of the said special meeting of stockholders, a proxy statement, a copy of the proposed asset purchase agreement between Continental and the said Blaw-Knox Company, and certain statements of the financial condition of Continental; that photostatic copies of the said notice, proxy statement, asset purchase agreement, and financial statements are attached hereto as Exhibit 1; that on October 28, 1955, the

instant cause was instituted to enjoin the contemplated sale of the said Blaw-Knox Company and for other relief; that at the special meeting of the stockholders of Continental held on October 31, 1955, 79% of the outstanding stock of Continental was voted in favor of the approval of the said plan; that on November 4, 1955, one week after the filing of the complaint herein, the trial of this cause was ordered and commenced; that the trial was completed on November 8, 1955; that Findings of Fact, Conclusions of Law and a Judgment in favor of the defendants-appellees was entered by the trial judge on November 14, 1955; that a copy of the said Findings of Fact, Conclusions of Law and a Judgment is attached hereto as Exhibit 2; that motions made on November 20, 1955, by the plaintiffs-appellants to amend the complaint to conform to the evidence and to amend the said Findings of Fact by adding thereto certain findings based on the uncontradicted evidence were denied by the trial judge on November 22, 1955.

5. That almost all of the evidence adduced by the plaintiffs-appellants consisted of testimony elicited from adverse witnesses who were officers or directors of Continental, or both.

6. That the uncontradicted evidence establishes the following facts:

A. That the replacement value of the plants, properties, and equipment of Continental, new, is between $45,000,000.00 and $50,000,000.00; that these assets are to be sold to Blaw-Knox Company under the said plan for $12,300,000.00.

B. That Continental has for several years last past, and is now, operating on a highly profitable basis; that it earned $4.46 per share in 1950, $6.05 in 1951, $8.40 in 1952, $7.13 in 1953, $6.89 in 1954, and it is estimated that its earnings in 1955 will be substantially the same as in 1954; that its prospects for future business appear to be favorable.

C. That in approving the said sale to the said Blaw-Knox Company and in recommending the said sale to the

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stockholders of Continental, the directors of Continental did not take into consideration the replacement cost of its plants, properties, and equipment, less an allowance for depreciation and obsolescence, nor the earning power of Continental, but used as the sole criterion of value the market price of Continental's stock on the New York Stock Exchange.

D. That the last appraisal of Continental's physical assets was made in 1920; that no appraisal was submitted to, considered by, or requested at the special meeting of the Board of Directors of Continental, held on September 19, 1955.

E. That an appraisal of Continental's physical assets cannot be completed in less than six months.

F. That no attempt was made by the Board of Directors or the officers of Continental to find a purchaser of its assets, other than the said Blaw-Knox Company.

G. That the proposed sale by Continental to Blaw Knox was negotiated by and between the Chairman of the Board of Directors of Continental and the President of the said Blaw-Knox Company during the period between June and September, 1955; that the said president of Blaw-Knox Company was a former president of Continental.

H. That as of August 31, 1955, 8,151 shares of Continental stock were subject to purchase under certain outstanding stock options at a price of $19.05 per share; that certain of the directors of Continental are among the optionees; that under the proposed plan of liquidation stockholders will realize $52.00 per share.

7. That the said proxy statement contains the following misleading statement:

> "The actuarial estimate of the past service pension liability of the Company, which Blaw-Knox will assume, is approximately $10,000,000. The Company's potential liability for past service under its present pension plan is not reflected in its accounts or in the accompanying financial statements."

that the uncontradicted evidence is, that if Continental were liquidated on September 19, 1955, its maximum liability for past service pension would not exceed $2,100,000.00; that the purpose of the language quoted was to induce the stockholders of Continental to sell their stock by inculcating them with the mistaken belief that Continental owed $10,000,000.00 more than was reflected on its balance sheet; that the uncontradicted testimony of Maurice F. Lipton, an actuary called as a witness for the defense, is that the statement quoted might mislead a lay reader; that the trial judge, while finding that the said quotation was not misleading, held that it "is perhaps subject to a clearer and more precise expression"; that the stockholders of a corporation, who must rely exclusively upon the recommendations of directors, are entitled to the clearest and most precise information in any proxy statement submitted to them.

8. That, as fiduciaries, the directors of a corporation in passing upon the sale of the corporation's assets are required to consider all elements of value; that in Lebold v. Inland Steel, 82 F. (2d) 351, 356 (C.C.A. 7th 1936), this Honorable Court held the following:

> "... The determination of value entails necessarily consideration of all elements that enter into value—cost of physical assets, additions, depreciation and appreciation, market price, earnings, the chances of future successful operation, and prospects of continued earnings. From evidence as to all such elements, true valuation is to be determined. The stocks of many corporations sell for less than their book values, which ordinarily are cost, plus additions and appreciation, less depreciation and obsolescence. On the other hand, the stocks of other corporations sell for many times such value."

that the Delaware Courts have held that on a sale of a corporation's assets the directors in determining the value of the assets to be sold should consider replacement value, less an allowance for depreciation and obsolescence, and earning power; that the Delaware Courts have further

held that the market value of a corporation's shares is not a reliable criterion of the value of assets; that, however, it is the only criterion of value employed by the Board of Directors of Continental.

9. That in failing to consider any criterion of value other than the market price of Continental's stock, the directors of Continental were grossly negligent in the performance of their duties and recklessly indifferent to the rights of the stockholders whom they purported to represent.

10. That the stockholders of Continental were entitled to receive full and complete information from the directors of Continental concerning the proposed sale to Blaw-Knox; that the directors in recommending the sale to Blaw-Knox were required, as fiduciaries, to obtain and consider full and complete information; that since the directors did not inquire into replacement cost, less depreciation and obsolescence, and earning power, their recommendation to the stockholders in favor of the sale were based upon a faulty and inadequate foundation and premise and the stockholders, not being fully advised, acted upon fragmentary information, the effect of which was misleading.

11. That in attempting to justify the sale to Blaw-Knox Company the defendants-appellees offered the testimony of Reed R. Vanderpoel, an employee of the Trust Department of the First National Bank of Chicago; that he testified that upon the basis of his experience in the investment field, which has been brief, stocks of the type of Continental normally sell at a maximum of nine times average earnings over a ten year period; that the use of this formula yields a market price for Continental stock of approximately $48.00 per share; that, however, this estimate gave no weight to the fact that Continental's earnings, as can be seen by examination of page 5, Exhibit 1, have increased substantially since 1951 and its prospects, at least for the immediate future, are excellent; that, moreover, in the final analysis, the said Reed R. Vanderpoel's testimony related solely to the market price

of Continental's stock and gave no weight to good will or to future possibilities and potentialities with respect to earnings; that the said Reed R. Vanderpoel knew nothing about the replacement value of Continental's assets; that finally it should be noted that Mr. Vanderpoel omitted to mention a fact of which this Honorable Court can take judicial notice, to-wit, that the stock of said Blaw-Knox Company, which is engaged in a business substantially similar to that of Continental, was selling in September on the New York Stock Exchange at a price equal to approximately thirteen times its annual earnings.

12. That Blaw-Knox Company has been fully informed from the beginning of the pendency of the instant cause; that its counsel was present in open court throughout the trial below; that, moreover, counsel for Blaw-Knox Company orally stipulated that in the event an injunction was entered restraining the said sale, Blaw-Knox Company would not hold Continental liable for breach of contract.

13. That the contemplated sale to Blaw-Knox Company is at a price approximately equal to the book value of the assets in question; that book value in this instance is not a reliable criterion of value because:

A. Most of Continental plants were acquired by it during the last depression at depression prices and are carried on the books at cost, less depreciation.

B. As found by the trial judge, certain assets have been depreciated at the rate of 20% per year under the Emergency Facilities provisions of the Internal Revenue Code; that the amount of such rapid depreciation over normal appreciation is $1,200,000.00

C. That one of the plants of Continental acquired by it from the United States Government at a cost of approximately $700,000.00 was constructed during World War II at a cost of approximately $6,000,000.00.

14. That the obvious disparity between the replacement cost of Continental's plants, properties, and equipment, new, estimated at $45,000,000.00 to $50,000,000.00 by cer-

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tain of the defendant-appellee directors and the price of $12,300,000.00 to be paid by Blaw-Knox Company required that the trial judge should at least have appointed an appraiser to determine the depreciated replacement cost, particularly in the light of the fact that Continental is now being operated on a profitable basis and no immediate need or urgency for its liquidation exists; that since the plaintiffs-appellants did not learn of the contemplated sale until October 5, 1955, and since they were ordered to trial on November 4, 1955, and since the defendant-appellee directors admitted that an appraisal could not be completed in less than six months, the plaintiffs-appellants could not in good reason be placed under the burden of supplying such an appraisal during the trial of this cause.

15. That the trial judge in denying the injunction requested below misapprehended the applicable law in that he did not require the consideration by Continental's Board of Directors of *all* of the elements of value enumerated in *Lebold* v. *Inland Steel,* 82 F. (2d) 351, 366 (C.C.A. 7th 1936) and in the applicable Delaware decisions. (See *Allied Chemical & Dye Corporation,* 122 Atl. 142, 146 (Del. Ct. of Ch. 1923).

16. That Continental has been in business for more than a quarter of a century; that it has at present some 2,700 stockholders; that its operations and profits have steadily expanded and increased over the years; that it is now the nation's third largest producer in its field; that its officers and personnel are skilled and experienced; that its President is a national recognized authority on the subject of tank armor; that many of its stockholders, including the plaintiffs-appellants, acquired their stock at a time when its market price was considerably lower than at present; that the earnings on their original investment are in excess of 15% and in some instances in excess of 20%; that no compelling reason exists for the liquidation of the company; that the sale to Blaw-Knox was conceived in haste and voted on, as aforesaid, without adequate consideration of the basic pertinent and essential facts; that

the trial judge committed an obvious substantial error of law in holding in effect that the market value of Continental's stock on the New York Stock Exchange was in itself a reliable and adequate criterion upon which Continental's Board of Directors could rely in determining the value of the assets to be sold to Blaw-Knox Company; that the trial judge further erred in holding that the language in the proxy statement quoted in paragraph 7 above was not misleading.

Wherefore, Gene Fink, Jerome Finkelstein, Charlotte Fink, Max Blumenfeld and Gene Fink, as co-partners, Lloyd M. Blummenthal, Jack and Esther Blumenthal, Phillip Goodman, and Martin Goodman, plaintiffs-appellants herein, respectfully pray that an order be entered by this Honorable Court enjoining and restraining the defendants-appellants from consummating the said sale during the pendency of this appeal and until further order of this Court.

.....

SAMUEL MORGAN, *Attorney for Plaintiffs-Appellants,*
105 W. Adams St., Chicago 3, Illinois

State Of Illinois }
County Of Cook } ss.

Samuel Morgan, being first duly sworn, on oath deposes and says that he is the attorney for the plaintiffs-appellants in the above-entitled cause; that he has read the above and foregoing petition by him subscribed; that he knows the contents thereof; and that the matters and things therein set forth are true is substance and in fact.

.....

Subscribed and sworn to before me
this ..... day of November, 1955.

.....

Notary Public

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11618 and
No. 11693 SEPTEMBER TERM AND SESSION, 1956

GENE FINK, JEROME FINKELSTEIN, CHARLOTTE FINK, MAX BLUMENFELD and GENE FINK, as co-partners, LLOYD M. BLUMENTHAL, JACK and ESTHER BLUMENTHAL, PHILLIP GOODMAN, and MARTIN GOODMAN,
Plaintiffs-Appellants,
v.
CONTINENTAL FOUNDRY & MACHINE COMPANY, a Delaware corporation, JAY T. OSLER, J. H. BRIGGS, KENT B. HALL, GRIER PATTERSON, J. H. ROSE, EARL STEWARD, and WILLIAM E. TROUTMAN,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

January 3, 1957

Before SWAIM and SCHNACKENBERG, *Circuit Judges*, and WHAM, *District Judge*.

WHAM, *District Judge*. This appeal seeks a reversal of a judgment of the district court denying injunctive relief and dismissing on its merits the action filed by plaintiffs, minority stockholders of Continental Foundry and Machine Company, a Delaware Corporation (hereinafter called "Continental"), as a secondary action under Rule 23(b), F.R.C.P., 28 U.S.C.A., to prevent Continental, its officers, directors and stockholders from selling its assets and liquidating the corporation.

The record shows that Continental, a large steel foundry and manufacturing company in sound financial condition, in June 1955 received from Blaw-Knox Company, a Delaware Corporation, (hereinafter called "Blaw-Knox"), another steel manufacturing concern, an offer to purchase approximately all of its assets for cash at approximate book value and to assume certain of its liabilities, including the cost of its employee pension plan. The offer was considered during the summer by the officers, the Executive Committee and certain of the directors of Continental who after such consideration concluded that the offer was sufficiently favorable that even though its acceptance would require liquidation of the corporation, which eventuality some of the directors opposed for personal reasons, the stockholders should have opportunity to pass on it. The details of the offer were not finally settled and reduced to writing until near September 1, 1955 after Blaw-Knox had succeeded in securing figures from actuaries estimating the cost to it of assuming Continental's pension plan. The writing was entitled Asset Purchase Agreement, specified the consideration, terms and conditions of the transaction, stated that the actuarial estimate of the pension liability Blaw-Knox offered to assume was approximately ten million dollars ($10,000,000) and fixed the closing time of the contract as not later than November 14, 1955.

On September 19 a directors' meeting was held by Continental with all directors present. The chairman submitted for consideration and action by the directors a plan for the liquidation of the corporation and for the sale of its assets to Blaw-Knox pursuant to its offer as set forth in writing in the Asset Purchase Agreement which was read to the meeting.

After a lengthy discussion and consideration of the plan and of the offer by Blaw-Knox to purchase the assets on terms set forth in the agreement, the board by resolution approved the plan to liquidate, recommended to the stockholders the authorization of the sale of the assets as expedient and for the best interests of the corporation,

authorized the officers of Continental to execute and deliver the Asset Purchase Agreement subject to subsequent approval by the stockholders and directed that a notice be given of a special stockholders' meeting to be held on October 31, 1955 to consider and act on the plan and offer of purchase. The Asset Purchase Agreement was executed by the proper officers of the respective corporations on September 19, 1955.

The notice of such special stockholders' meeting was mailed to each shareholder on October 3 with a statement by the Board of Directors thereto attached recommending the liquidation of the corporation and the sale of its assets to Blaw-Knox pursuant to the Asset Purchase Agreement as being expedient and for the best interests of the corporation; also with a factual statement describing Continental's assets, liabilities, earnings, reserves, taxes, nature of its business including percentage of defense contracts, the market value of its common stock over the preceding three years and other pertinent information; also a copy of the Asset Purchase Agreement, with a brief summary of its terms and conditions, including the pension plan to be assumed by Blaw-Knox with an estimate of the liability so assumed at $10,000,000; also an estimate of dividends to be distributed after liquidation of $52.00 per share to Continental's stockholders after payment of debts; and stated that the recommended sale price of assets would approximate their book value and be higher than the highest price the stock had sold for on the market.

On October 21, 1955 plaintiffs served demands upon the Board of Directors of Continental that the resolution adopted at the directors' meeting be rescinded and no further steps be taken toward the sale of its assets and the liquidation of the corporation.

On October 28, 1955 plaintiffs began this action by filing their complaint against Continental and part of its officers, directors and stockholders (Blaw-Knox not being made a party) seeking temporary and permanent injunctions to restrain the special stockholders' meeting

from approving the plan and restraining and enjoining the defendants from executing it with notice to defendants that the temporary injunction would be sought in district court at 10:00 a.m. on October 31, 1955. Pursuant to this notice the district court heard the parties by their counsel, denied the temporary injunction and set the hearing on the prayer for a permanent injunction and on the merits of the complaint for November 4, 1955 at 10:00 a.m.

On October 31, 1955 at 11:00 a.m., after the denial of the temporary injunction, the special stockholders' meeting was held and of the outstanding common stock of Continental having voting power of close to 500,000 shares, approximately 395,000, or 79%, were voted to authorize the sale of Continental's assets to Blaw-Knox and the liquidation of the corporation; approximately 25,000, or 5%, were voted in opposition; and approximately 80,000, or 16%, were not voted or were not represented at the meeting.

On November 4 the court proceeded with the hearing on the merits of the complaint and application for a permanent injunction. Copious evidence, oral and written, was received from witnesses for both parties, arguments of counsel heard and the case taken under advisement. On November 14, 1956 which was the closing date fixed in the contract with Blaw-Knox the court filed written findings of fact and conclusions of law and pursuant thereto entered judgment denying the prayer for permanent injunction and dismissing the action at plaintiffs' cost. On November 14, following the denial of the injunction sought and the dismissal of the action by the district court, the Asset Purchase Agreement between Continental and Blaw-Knox was closed between the two corporations pursuant to its terms, the assets being delivered by Continental and the consideration paid by Blaw-Knox. Continental then proceeded with its plan to liquidate.

On November 21, the court on plaintiffs' motion fixed the amount of the cost bond for appeal at $250.00 and on November 26 plaintiffs filed their notice of appeal with approved bond in said amount. No application for a stay

order against defendants pending appeal was made by plaintiffs in district court after final judgment.

On December 2 appellants filed in this court a petition with extensive allegations of fact relating to the merits of the case and the proceedings in the district court praying an order from this court restraining appellees from consummating the sale of the corporate assets and the liquidation of the corporation pending the outcome of the appeal. On December 5 appellees filed their motion (1) to dismiss appellants' petition for injunction and (2) to dismiss the appeal. Appellees' motion to dismiss the appeal was supported by affidavit setting up facts calculated to show that the sale of assets had been consummated on November 14 and the liquidation in part completed before appellants' petition for injunction was filed in this court on December 2. Briefs were filed and on December 6 Judge Major of this court denied the petition for injunction and denied the motion to dismiss the appeal, but without prejudice.

On April 28, 1956 it was stipulated by counsel for the parties before the clerk of this court that an attorney for Blaw-Knox was present in the courtroom during the trial of this case in the district court.

On May 5, 1956 appellees filed in this court a motion, supported by affidavit, to dismiss the appeal on the ground that the cause had become moot by reason of the consummation of the Asset Purchase Agreement with Blaw-Knox and the substantial completion of the liquidation of Continental with distribution of proceeds in dividends to the stockholders, including appellants, in so far as they still owned the stock; that all but two of the plaintiff stockholders, since appeal taken, had disposed of their stock and had no further interest in the case. Appellan.. filed objections to the motion to dismiss with supporting affidavit showing that all eight of the plaintiffs were stockholders when the action was filed, admitting that six had thereafter disposed of their shares and that the two of the original plaintiffs who still owned stock had accepted and received payment of their liquidation dividends

to date of $40.00 and $5.00 per share. Judge Finnegan on May 28 ordered this motion to be taken with the case and the briefs filed.

On July 24 it was stipulated by counsel that Cause No. 11618, being the original appeal from the district court, and Cause No. 11693, being the post judgment proceedings filed in this court, be consolidated and that all pleadings, affidavits, briefs and other written matters in each cause be deemed filed in the other. By order of this court entered on July 25, 1956 the causes were so consolidated and this court now has before it all proceedings in the district court and in this court.

This appeal, in its present state, present two broad questions, namely, is there merit in the appeal and has the case become moot during the pendency of the appeal.

Appellees urge that the appeal, if considered on its merits, must be dismissed and the judgment of the district court affirmed. First, however, the urge that due to events since the judgment was rendered by the district court the appeal has become moot and must be dismissed.

Appellants say that the appeal is not moot for the reason that appellees during the time allowed by law for an appeal wrongfully transferred the subject-matter of this suit to Blaw-Knox which corporation had full knowledge of the injunction suit and plaintiffs' right of appeal. Appellants say further that despite events the appeal should not be dismissed as moot but should be considered on its merits that the court may grant such incidental relief, if any, as the appellants may be entitled to if the judgment be not sustained on the merits. Appellants while citing other authorities in support of their contentions chiefly rely upon the case of *Ramsburg* v. *American Investment Company of Illinois*, 7 Cir., 231 F. 2d 333.

In the *Ramsburg* case a plan of merger was formed between two Delaware corporations referred to in the opinion as American and Domestic. The merger was opposed by certain stockholders of Domestic in a derivative suit seeking temporary and permanent injunctions to pre-

vent the merger. Both corporations were made parties defendant. Plaintiffs also sought to recover treble damages under the Anti-Trust Act from American for injury to Domestic through alleged illegal acts of American in exercising unlawful control of Domestic. (Clayton Act, Sec. 7, 15 U.S.C.A. Sec. 18.) After a hearing the district court denied the motion for temporary injunction. Plaintiffs appealed. Despite the appeal defendant corporations proceeded to complete the merger and in the process the assets of Domestic were transferred to American. The defendants then moved to dismiss the appeal as moot on the ground that the only act sought to be restrained, namely the merger, had been accomplished and no relief could be granted plaintiffs.

In disposing of the motion to dismiss the appeal as moot this court, speaking through Judge Lindley, reviewed applicable authorities and quoted with approval from *Porter* v. *Lee*, 328 U.S. 246 at 251:

> "'Where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo.'"

Also from *Turney* v. *Shriver*, 269 Ill. 164, 109 N.E. 708:

> "'Where a bill for an injunction has been filed, and the court has acquired jurisdiction of both the person and the subject-matter of the suit, and the defendant does any act which the bill seeks to enjoin, such party acts at his peril and subject to the power of the court to compel a restoration of the status, or to grant such other relief as may be proper under the particular circumstances of the case.'"

After citing other similar cases the court said "Applying these decisions we are able to formulate the question for determination where, as here, a cause for injunctive relief is met by a contention of mootness because the status of the parties and their relationship to the subject matter has changed. The decisive issue is whether the subject matter may yet be reached by the mandatory

power of equity and the status quo restored. If so, the cause is not moot. * * * And even where the subject matter has been so completely destroyed as to preclude restoration of the status quo, the court still has jurisdiction to grant incidental relief and the cause is not moot. *Barrett* v. *Denver Tramway Corp.*, 3 Cir., 146 F. 2d 701; *United States* v. *Bates Valve Bag Corp.*, D.C., 39 F. 2d 162."

In denying the motion to dismiss the appeal as moot this court said: "We have jurisdiction of the parties and of the subject matter, *i.e.*, the assets of Domestic, which are in the possession and control of American as the surviving corporation; and we have the power to compel a restoration should our ultimate determination be that the circumstances of the case require that result. The appeal, therefore, is not moot."

In Ramsburg both corporations involved in the merger were parties defendant and with their assets subject to the court's jurisdiction and to its mandatory powers. By the transfer of assets from one corporation to the other pending appeal the court lost jurisdiction of neither the parties nor the assets. Then, too, the complaint sought relief under the Anti-Trust Act.

A brief review of the facts in the instant case will disclose how widely it differs from Ramsburg. Of the two corporations involved in the purchase and sale of Continental's assets which appellants sought to enjoin, Continental only, the seller, is a party defendant and within the jurisdiction of the court. Blaw-Knox, the purchaser, is not a party and at no time has been within the jurisdiction of the court. The presence of an attorney for Blaw-Knox in the courtroom during the trial and at the time of the judgment did not serve to give the court jurisdiction of Blaw-Knox or affect its rights under its contract with Continental to have its assets transferred to it when injunction was denied and suit dismissed as without merit.

At the time plaintiffs were denied the permanent injunction they sought and their suit was dismissed, though

they knew Continental was contractually bound to sell and transfer its assets to Blaw-Knox on that day, plaintiffs took no step under Rule 62, F.R.C.P., 28 U.S.C.A., to secure from the trial court a temporary injunction or stay for the purpose of maintaining the status quo pending appeal. Neither did plaintiffs seek a delay in the entry of the judgment to give more time for such measure to be taken if more time was required. *United States* v. *El-O-Pathic Pharmacy*, 9 Cir., 192 F. 2d 62, 79; *Shinholt* v. *Angle*, 5 Cir., 90 F. 2d 297; *McBride* v. *Western Union Telegraph Co.*, S.D. Calif., 78 F. Supp. 446, armed 171 F. 2d 1; *Lapin* v. *La Maur Inc.*, D. Minn., 11 F.R.D. 339; *Di Melia* v. *Bowles*, D. Mass., 57 F. Supp. 710. On the same day that the judgment was entered, being under no restraint, Continental and Blaw-Knox pursuant to the terms of the contract between them closed the transaction, Continental conveying and transferring its assets to Blaw-Knox and Blaw-Knox paying to Continental the agreed consideration. When Blaw-Knox thus received title and possession on that day the assets passed from the jurisdiction of the court and beyond the reach of its equitable powers.

In the same way, after the injunction had been denied and the action dismissed, Continental was free in so far as any court order was concerned to proceed with its plan for liquidation of which the sale of its assets was a principal step. This sale had been completed and the distribution of the proceeds thereof to the stockholders was about to be made on December 2, 1956 when appellants filed in this court their petition for an order staying the liquidation during the pendency of the appeal. This petition was denied leaving the parties in the same position as before and leaving Continental free to continue the liquidation. Even then the status of the parties and their relationship to the subject-matter had been so changed as to make complete restoration of the status quo quite impossible. The liquidation has now been completed to the extent that through the distribution to the stockholders and creditors of the proceeds of the sale and of other funds it may have had Continental is without money or

assets. Nothing remains to be done toward the liquidation for the court to enjoin.

The instant case is similar to *Sobel* v. *Whittier Corp.*, 6 Cir., 195 F. 2d 360, in which a stockholder sought to enjoin a corporate merger but did not make the other corporation a party to the suit. When the district court dismissed the suit no attempt was made to have the status quo maintained pending appeal and the merger was consummated. The Court of Appeals held the appeal moot on the ground that contract rights of those not parties had attached making relief impossible. The court said: "Since appellant only asked to restrain the merger, and the order of the district court dismissing the bill of complaint dissolved any such restraint which had therefore existed by way of a temporary restraining order, and since appellant did not take any steps to preserve the existing status pending appeal, no relief could be here given, since the plan sought to be restrained has already been carried out, and, as heretofore said, the appeal is moot. *Hyams* v. *Calumet and Hecla Mining Co.*, 6 Cir. 221 F. 529." See *Kelaghan* v. *Industrial Trust Co.*, 1 Cir., 211 F. 2d 134; cf. *Selected Products Corporation* v. *Humphreys*, 7 Cir. 86 F. 2d 821; *R. J. Reynolds Tobacco Co.* v. *Robertson*, 4 Cir., 80 F. 2d 966, cert. den. 297 U.S. 719.

The general law, as well as the law in this circuit, has long been established that if pending an appeal an event occurs which renders it impossible for the appellate court to grant any relief or renders a decision unnecessary the appeal will be dismissed. *Selected Products Corporation* v. *Humphreys, supra,* citing many cases. The court went on to say: "There must be actual controversy; an appeal will not be entertained to determine moot questions, and it will be dismissed, therefore, if by act of the parties or otherwise the circumstances have so changed that it is impossible or unnecessary for the appellate court to grant relief." Among the cases that were cited in support of the above principle is *American Book Co.* v. *Kansas*, 193 U.S. 49, which, in turn, cited *Mills* v. *Green*, 159 U.S. 651,

where the court said: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from a judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

As will be noticed, the authority last quoted qualifies the rule that an appeal that has become moot should be dismissed by the phrase "without any fault of defendant." This point has been installed and relied upon by appellants in their opposition to the motion to dismiss this appeal as moot. They say that it was entirely by the fault of Continental after judgment that its assets have passed beyond the jurisdiction of the court and the liquidation of the corporation has advanced beyond the stage at which effectual relief would be possible. Without considering this point at length it is quickly disposed of here by saying that we find no fault in what Continental has done. It is true that it was by the act of Continental that the assets were transferred out of the jurisdiction of the court and the liquidation accomplished but Continental did only that which it had a right to do. It was under a contract to sell its assets to Blaw-Knox on the day the sale and transfer was made. Earlier the same day the court had refused to enjoin it from selling and dismissed the suit. After the case had been tried on its merits and permanent injunction denied with dismissal of the complaint for want of merit Continental was free of restraint. If plaintiffs desired that the status quo be maintained pending appeal means were afforded in proper case by Rule 62, F.R.C.P., as heretofore pointed out. Plaintiffs failed to seek such protection. The appeal was

not taken until twelve days after the judgment and then no stay was sought. In the meantime the assets of Continental had passed from the court's jurisdiction by the act of Continental without fault on its part. After it was too late to be effective plaintiffs sought and were denied injunctive relief in this court on December 2, 1955. There appears to be nothing this court can do now to restore the status quo should the appeal be upheld.

By reason of events heretofore pointed out the appeal here has become moot and must be dismissed. It is so ordered.

OPPOSITION

BRIEF

JUN 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 1022

GENE FINK, JEROME FINKELSTEIN, CHARLOTTE FINK, MAX BLUMENFELD AND GENE FINK, AS CO-PARTNERS, LLOYD M. BLUMENTHAL, JACK AND ESTHER BLUMENTHAL, PHILLIP GOODMAN, AND MARTIN GOODMAN,

Petitioners,

vs.

CONTINENTAL FOUNDRY & MACHINE COMPANY, A DELAWARE CORPORATION, JAY T. OSLER, J. H. BRIGGS, KENT B. HALL, GRIER PATTERSON, J. H. ROSE, EARL STEWARD, AND WILLIAM E. TROUTMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 1022.

GENE FINK, JEROME FINKELSTEIN, CHARLOTTE FINK, MAX BLUMENFELD AND GENE FINK, AS CO-PARTNERS, LLOYD M. BLUMENTHAL, JACK AND ESTHER BLUMENTHAL, PHILLIP GOODMAN, AND MARTIN GOODMAN,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The petition should be denied because it presents no question of general importance and because it is based upon three asserted reasons for its allowance which are in fact nonexistent. A brief statement of the nature of the case shows this to be true.

Petitioners, then stockholders in Continental Foundry & Machine Company* (herein called "Continental"), sought injunction in the Indiana District Court against the proposed liquidation and sale of all of Continental's assets to Blaw-Knox Company. Jurisdiction was invoked on the grounds of diversity of citizenship. Defendants were Continental (a Delaware corporation) and, to avoid destroying diversity, those of the directors who were citizens of states other than Indiana. Blaw-Knox Company, the prospective purchaser, was not made a party.

Pursuant to directors' action, Continental had entered into an agreement (subject to stockholders' approval) under which it agreed to sell to Blaw-Knox all of its physical assets. This agreement was later approved by a vote of 94% of the stockholders who voted (84% were represented at the meeting.)

Trial on plaintiffs' claim for a permanent injunction was concluded on November 8, 1955. On November 14, the District Court denied plaintiffs' claim for injunctive relief and dismissed the action. Thereupon, the parties proceeded to consummate the sale in accordance with the contract. Subsequently, Continental began to make liquidating distributions to its stockholders from the consideration it had received from Blaw-Knox and from the other assets which it owned (Pet., 1a-4a).

As the Court of Appeals opinion points out, plaintiffs made no effort to obtain a temporary injunction or stay order from the District Court (Pet., p. 22a). The appeal was not taken until November 26, 1955 (R. 331). On December 2, petitioners petitioned the Court of Appeals for an injunction against "consummating the sale" (Pet., p. 13a) (notwithstanding it had already been consummated)

* Only two were still stockholders at the time of the Court of Appeals opinion, the others having meanwhile disposed of their interests (Pet., p. 18a).

ending the appeal, and respondents moved to dismiss the petition and appeal on the ground of mootness. A judge of the Court of Appeals denied the petition. He also denied the motion to dismiss the appeal, but without prejudice. A renewed motion to dismiss was taken with the case (Pet., p. 18a). On January 3, 1957, the Court rendered an opinion finding the case had become moot and entered an order dismissing the appeal.

It is obvious from the foregoing statement that the Court of Appeals reached the correct conclusion because: (1) lack of jurisdiction over Blaw-Knox, the purchaser, made it impossible to restore the *status quo*. (Cf. *Sobel* v. *Whittier Corp.*, 195 F. 2d 360, cited by the Court of Appeals.) (2) Continental's liquidating distributions to its stockholders made it impossible for it to restore the consideration paid by Blaw-Knox (Pet., pp. 18a, 19a).

Before discussing these points in detail, we think it necessary to point out the invalidity of petitioners' claim that they "established" at the trial that the directors were guilty of wrongdoing in connection with the sale (Pet., p. 3) and that their evidence was "in the main uncontradicted" (Pet., p. 7). It is sufficient to say that the District Court in detailed findings (R. 322-327) found against these so-called "established" facts.

The petition, after pointing out that the Court relied primarily upon *Sobel* v. *Whittier Corp.*, 195 F. 2d 360 (C. A. 6), says that that case is distinguishable, but, assuming that it is not, it is inconsistent with the holding of the Third Circuit in *Barrett* v. *Denver Tramway Corp.*, 146 F. 2d 701, which followed *U. S.* v. *Bates Valve Co.*, 39 F. 2d 162 (D. C. Del.) (Pet., p. 4). It is not true that there is any conflict between the *Sobel* case and the *Barrett* case.

In the *Barrett* case the District Court had dismissed a suit to enjoin the consummation of a proposed recapitaliza-

tion plan. Pending appeal the plan was consummated. The Appeals Court held that the case was not moot notwithstanding the consummation of the plan because it had jurisdiction *of all parties and the subject matter*, and thus it could effectively compel the restoration of the original situation.

In the instant case the petitioners studiously avoid advising this Court that the District Court did not have jurisdiction over Blaw-Knox and therefore there was no way possible of undoing the sale. Petitioners' statement of "Question Presented" (Pet., p. 2) is misleading because it omits mention of this controlling fact.

The case of *U. S.* v. *Bates Valve Corp.*, 39 F. 2d 162, also relied upon (p. 4), is a District Court decision which did not involve the question of mootness of an appeal but of an action pending in the trial court, and is so different factually as not to merit discussion. The decisions of this Court cited at page 6, with which the instant decision is asserted to be "completely at variance," are also so different in their facts as to have no application to the situation in this case. In each case the circumstances were such that the reviewing court had power to compel a restoration of the *status quo*.

The petition further asserts that the decision of the Court of Appeals conflicts with the decision of "another division"* of the same court rendered only a few months previously, citing *Ramsburg* v. *American Investment Co.*, 231 F. 2d 333. In *Ramsburg* an injunction was sought against the merger of two corporations and the District Court denied a motion for temporary injunction. Pending an appeal from the denial, the merger was completed. Defendants then moved to dismiss the appeal on the ground

* This is a misnomer. The Seventh Circuit Court of Appeals does not have divisions. The panel hearing any case may consist of any three members of the Court.

of mootness. The Court of Appeals held the case had not become moot because the Court *had jurisdiction of all parties* and the subject matter and could thus effectively compel restoration of the original situation. The Court of Appeals properly recognized that this fact plainly operated to distinguish this case from the *Ramsburg* case (p. 21a).

Respondents believe the decisions of both courts below to be correct, but, whether that is true or not, it is obvious that the case presents no legal question of general public importance. This Court has said many times that it does not sit to correct every asserted error by a lower court. Plainly, when the instant case was submitted to the Court of Appeals it had become as moot as a case can ever become and the Court properly dismissed the appeal on that ground.

The petition should be denied.

Respectfully submitted,

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